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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH AMOS SIMON,

Defendant and Appellant.

D060093

(Super. Ct. No. SCD232604)

APPEAL from a judgment of the Superior Court of San Diego County, Esteban Hernandez, Judge. Affirmed in part, reversed in part, and remanded with directions.

Defendant Joseph Amos Simon was convicted of selling fake cocaine base in violation of Health and Safety Code section 11355. The court found true the allegation that Simon had prior convictions for drug-related offenses in 2002, 2005, and 2006 within the meaning of Health and Safety Code section 11370, subdivision (a), and that those convictions rendered him ineligible for probation under Penal Code section 1203, subdivision (e)(4). The court also found true the allegation that Simon had served a prior

prison term for his 2005 and 2006 convictions within the meaning of Penal Code sections 667.5, subdivision (b) and 668.<sup>1</sup>

The court sentenced Simon to three years in state prison, consisting of a two-year midterm for the drug offense and a consecutive one-year term for the prison prior conviction.

On appeal, Simon contends (1) his equal protection rights were violated because he was not sentenced under the Criminal Justice Realignment Act of 2011, which became effective after his sentencing date, and under which he would have served his sentence in county jail as opposed to state prison; and (2) the court erred when it imposed criminal laboratory analysis and drug program fees because the amounts imposed were in excess of the statutory maximums.

We reject Simon's equal protection argument as to his sentence. However, because the record is unclear as to the statutory bases for the court's imposition of fees and mandatory penalty assessments, we remand that issue to the trial court for clarification.

## FACTUAL BACKGROUND<sup>2</sup>

Simon sold what he told an undercover officer was cocaine base. It turned out the items Simon sold were fake.

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<sup>1</sup> All further undesignated statutory references are to the Penal Code.

<sup>2</sup> Because the facts of this case are not relevant to the issues raised on appeal, we state them only briefly.

## DISCUSSION

### I. *SIMON'S EQUAL PROTECTION CHALLENGE*

#### A. *Legislative Background*

The Criminal Justice Realignment Act (Realignment) was enacted in 2011. The Realignment legislation identified certain low-level felony offenses and mandated that the sentences for these offenses be served in county jail rather than state prison. (§ 1170, subd. (h).) Realignment became effective on October 1, 2011, after Simon was sentenced. (§ 17.5.) It was also provided that "[t]he sentencing changes made by the act that added this subdivision shall be applied *prospectively* to any person sentenced on or after October 1, 2011." (§ 1170, subd. (h)(6), italics added.) Defendants who, like Simon, sell material in lieu of a controlled substance are included in those categories of crimes for which the sentence shall be served in county jail. (§ 1170, subd. (h)(2); Health & Saf. Code, § 11355.)

Realignment also provides for an alternative to county jail incarceration for a concluding portion of the jail term. Part of that term may be completed through release to the community subject to supervision by the probation department. (§ 1170, subd. (h)(5)(B).) Also, because those qualifying offenders under Realignment serve time in county jail, instead of state prison, they are not subject to an automatic parole period. (§§ 1170, subd. (a)(1), 3000 et seq.)

#### B. *Analysis*

The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. (*Cooley v. Superior*

*Court* (2002) 29 Cal.4th 228, 253.) Accordingly, " '[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' " (*Ibid.*) "This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' " (*Ibid.*)

Assuming Simon is similarly situated to defendants who are eligible for county incarceration under Realignment, his equal protection challenge is not well taken as (1) Realignment does not affect any fundamental interests, and (2) it is rationally related to a legitimate government purpose: "The equal protection standard employed where there are no ""suspect classifications"" or classifications impinging upon ""fundamental interests"" is the ""rational basis"" test. This test invests the questioned legislation with a presumption of constitutionality and requires merely that the distinction drawn by a challenged statute bears some rational relationship to a conceivable legitimate state purpose." (*In re Stinnette* (1979) 94 Cal.App.3d 800, 805.)

It is undisputed that "suspect" categories such as race, ancestry or national origin are not implicated in this case. Additionally, because the challenged legislation does not authorize confinement of a prisoner for a longer term than he or she would have served, it does not infringe upon any personal liberty interest. (*In re Stinnette, supra*, 94 Cal.App.3d at p. 805 & fn. 4.) Thus, we analyze Simon's equal protection challenge under the "rational relationship" test.

Recently, in *People v. Cruz* (2012) 207 Cal.App.4th 664, the Court of Appeal rejected an identical equal protection challenge to Realignment. In doing so, the Court of Appeal held that Realignment bears a rational relationship to the purposes stated by the Legislature: reduction of recidivism and improvement of public safety (both of which are legitimate purposes), while simultaneously reducing corrections and related criminal justice spending.<sup>3</sup> (*Id.* at p. 679.) Second, the distinction drawn based on sentencing date is necessary to further the purpose of Realignment by (a) allowing counties to muster the resources to deal with the influx of prisoners and develop the necessary community-based programs and punishments Realignment requires; (b) preventing county jails from being overwhelmed with numbers of inmates for which local authorities are unprepared, which in turn could result in those authorities having to take actions that severely impact public safety; and (c) preventing trial court resources from being overwhelmed with the resentencing of numerous inmates. (*Id.* at pp. 679-680.)

"The distinction drawn by section 1170, subdivision (h)(6), between felony offenders sentenced before, and those sentenced on or after, October 1, 2011, does not violate equal protection. Accordingly, [Simon's] existing sentence is lawful, and he is not entitled to a remand for resentencing under the Act's provisions." (*People v. Cruz, supra*, 207 Cal.App.4th at p. 680.)

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<sup>3</sup> The protection of public safety and prevention of recidivism are compelling state interests. (See *People v. Travis* (2006) 139 Cal.App.4th 1271, 1292; *Guevara v. Superior Court* (1998) 62 Cal.App.4th 864, 872.)

## II. FEES IMPOSED AT SENTENCING

Simon asserts the court imposed fees at sentencing in excess of the amounts proscribed by Health and Safety Code sections 11372.5 and 11372.7. Accordingly, he asserts we must modify the judgment to reflect the correct amount of fees allowed under those sections. We conclude, as the People contend, that because the record is silent as to the court's rationale for the imposition of fees and mandatory penalty assessments, we must remand the matter to the trial court for clarification.

### A. Background

When Simon was sentenced, the court ordered him to pay a \$190 lab analysis fee under Health and Safety Code section 11372.5 and a \$570 drug program fee under Health and Safety Code section 11372.7. However, the record is silent as to the court's rationale for imposing those amounts.

### B. Analysis

Health and Safety Code section 11372.5, subdivision (a) provides that persons convicted of certain offenses "shall pay a criminal laboratory analysis fee in the amount of fifty dollars (\$50) for each separate offense." Health and Safety Code section 11373.7, subdivision (a) provides that every person who is convicted of a drug-related offense "shall pay a drug program fee in an amount not to exceed one hundred fifty dollars (\$150) for each separate offense."

However, the fines imposed under those sections are also subject to various mandatory penalty assessments. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153 [penalty assessments applicable to " 'every fine, penalty, or forfeiture' " apply to

laboratory analysis fees under Health and Safety Code section 11372.5]; *People v. Sierra* (1995) 37 Cal.App.4th 1690, 1694-1696 [mandatory penalty assessments imposed on drug program fine].)

Indeed, there are several mandatory penalty assessments appropriate in this case, including those under Penal Code section 1464 and Government Code section 76000. (*People v. Turner* (2002) 96 Cal.App.4th 1409, 1413-1414.) Others that may be appropriate include Penal Code section 1465.7 (20 percent state surcharge), Government Code sections 70372 (courthouse construction fee) and 76104.6 (DNA Fingerprint, Unsolved Crime and Innocence Protection Act).

As stated, *ante*, the record is not clear what mandatory penalty assessments were imposed and in what amounts. As the Court of Appeal stated in *People v. High* (2004) 119 Cal.App.4th 1192, 1200, "Although [the appellate court] recognize[s] that a detailed recitation of all the fees, fines and penalties on the record may be tedious, California law does not authorize shortcuts. All fines and fees must be set forth in the abstract of judgment."

Because the record here is silent as to the statutory basis for the penalty assessments imposed and whether the amounts are correct or incorrect, remand for clarification is the appropriate remedy.

## DISPOSITION

The matter is remanded to the trial court with directions that the court specify the amount of the laboratory analysis fee and drug program fee and the penalty assessment attached to them. In all other respects, the judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.